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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal State Joint Board	)	
on Universal Service	)	CC Docket No. 96-45
	)	
Southwestern Bell, Pacific Bell, and	)	
Nevada Bell Joint Petition for Stay	)	

OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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July 18, 1997

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The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its opposition to the Joint Petition for Stay of the Commission's Order in the above-captioned proceeding,[1] filed by Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell ("Petitioners"). NCTA is the principal trade association of the cable television industry in the United States, representing cable television operators serving over 80 percent of the Nation's cable television households and more than 100 cable programming networks. Through its Cable in the Classroom program, NCTA's members have brought news, public affairs, and educational programming to schools and libraries since 1989. Cable companies also pioneered distance learning services and, more recently, have begun to provide schools and libraries with high-speed access to the Internet. As Congress intended, universal service support for advanced telecommunications and information services will enhance these efforts.

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[1] In the Matter of Federal State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order" or "Order").

INTRODUCTION AND SUMMARY

Petitioners have failed to satisfy the heavy burden imposed on someone seeking a stay of an agency order.[2] As a threshold matter, they have not demonstrated that they will be likely to prevail on the merits of their argument. The statute expressly mandates competitively neutral rules to enhance schools' and libraries' access to advanced telecommunications and information services, and the Order faithfully implements this mandate. Petitioners attempt to avoid this inconvenient congruence between the law and the Commission's regulations by examining the advanced services provision in isolation from the rest of the statutory framework for universal service. This flawed analysis yields a predictably flawed conclusion that would vitiate Congress's clear desire to make advanced services available to every school and library. The Commission, by contrast, correctly understood that that mandate can only properly be understood as an integral part of the "specific, predictable, and sufficient mechanisms" required by Congress to preserve and advance universal service.

While Petitioners adduce only the most speculative of harms to justify their stay request, a stay will most definitely harm schools, libraries, their students and users, and providers of advanced services by delaying the availability of support for the facilities and services encompassed within the universal service mandate. The public interest would be grossly disserved by such a result. The Commission should reject Petitioners' attempt to excise a critical element of Congress's universal service plan and deny their request for a stay.

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[2] To obtain a stay, the moving party must show that (1) it is likely to prevail on the merits; (2) it will be irreparably injured without a stay; (3) the issuance of the stay will not substantially harm other parties interested in the proceeding; and (4) the public interest will be served by the stay. WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

DISCUSSION

I. PETITIONERS ARE UNLIKELY TO PREVAIL ON THE MERITS

Petitioners argue that they are likely to prevail on the merits of their appeal because (1) the Commission incorrectly interpreted the statutory language of Section 254 to permit universal service support for non-telecommunications services, including Internet access and internal connections, and funding for non-telecommunications carriers; (2) the Commission's interpretation renders Section 254 an unconstitutional delegation of Congressional authority to an administrative agency and an unconstitutional tax; and (3) the Commission incorrectly interpreted Section 254 to create a single fund to support both interstate and intrastate services for schools, libraries, and health care providers. Petitioners' arguments find no support in the statutory language, the legislative history, or common sense.

A. Subsection 254(h)(2)(A) Authorizes Universal Service Support for Non-Telecommunications Services and Funding to Non-Carriers

Section 254(h)(2)(A) requires the Commission to establish "competitively neutral rules to enhance . . . access to advanced telecommunications and information services" for schools, libraries, and health care providers.[3] The Commission correctly found that this language authorizes it to establish discounts and funding mechanisms for advanced services provided by a wide range of providers.[4] Petitioners, however, argue that subsection 254(h)(2)(A) makes no reference to funding or universal service support, but merely authorizes the Commission to adopt

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[3] 47 U.S.C. § 254(h)(2)(A).

[4] Universal Service Order at ¶ 591.

rules to enhance access.[5] In essence, Petitioners would read subsection (h)(2) completely out of context. This bizarre reading of one statutory provision to the exclusion of other, related provisions must fail. The result sought by Petitioners is not supported by the statutory language or the legislative history of this subsection.

Subsection (h)(2) was expressly intended to extend "the already existing universal service provisions within the legislation . . . to include schools, libraries and hospitals."[6] Thus, contrary to Petitioners' spurious suggestions, it was unnecessary for Congress to include a separate funding mechanism for schools and libraries in this subsection. Rather, support for this particular aspect of universal service would come from the "specific, predictable, and sufficient" mechanisms established pursuant to subsections (a) and (d). Petitioners' attempt to prevail by reading section 254(h)(2) in isolation, rather than examining the universal service structure as a whole, violates the fundamental rule of statutory construction that related provisions must be read together.[7]

Within the context of section 254, moreover, the directive to the Commission in subsection 254(h)(2) to "establish . . . rules" is sufficiently broad to empower the agency to include funding for these advanced services as part of any universal service support mechanism adopted. Indeed, read literally, nothing in section 254 authorizes the creation of such a fund.

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5 Petition at 14-15.

6 141 Cong. Rec. S7990 (daily ed. June 8, 1995) (statement of Sen. Snowe).

7 King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991) (setting forth the "cardinal rule" that a statute is to be read as a whole, as the meaning of the statutory language, plain or not, depends on the context); see also United States Department of Energy v. Ohio, 503 U.S. 607, 630 (1992) ("It is axiomatic that a statute should be read as a whole.").

Rather, Congress spoke in terms of "mechanisms" to preserve and advance universal service, universal service "support," and a carrier's universal service "obligation."[8] From these provisions, the Commission derives its authority to mandate the creation of a fund to support the universal service requirements established by Congress. In this context, the lack of a specific reference to a "fund" in section 254(h)(2) does not suggest any legislative intent to preclude support for advanced services.

Likewise, Petitioners' argument against supporting services other than telecommunications services is without merit. Subsection 254(h)(2)(A) itself expressly refers to "advanced telecommunications and information services."[9] As the conferees explained, under this provision

> the Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet.[10]

Congress clearly envisioned that internal connections would be included as well.[11]

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[8] See, e.g., 47 U.S.C. §§ 254(d), 254(e), and 254(h)(1)(A).

[9] 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[10] H.R. Conf. Rep. No. 104-458, at 133 (1996). See also Radio Address of the President to the Nation, at 2 (Feb. 8, 1997) <www.whitehouse.gov/WH/html/1997-02-08.html>("Under the Telecommunications Act, the Federal Communications Commission is now developing a plan to give schools and libraries access to the Internet at a dramatically discounted rate.").

[11] 141 Cong. Rec. S7981 (daily ed. June 8, 1995) (statement of Sen. Rockefeller) ("But another reason, which becomes more serious as schools do scrape together the money for the one-time expense of buying equipment, is their inability to pay excessive rates to hook into those services. It is one thing to have the computer on the table or the desk. It is another to have that hooked up to the wall and then through that wall to the other wall. That is expensive.")

The statutory language and the legislative history of subsection 254(h)(2)(A) also indicate that funding should be provided to non-telecommunications carriers, Petitioners' arguments to the contrary notwithstanding. Subsection 254(h)(2)(A) requires the Commission to establish "competitively neutral rules to enhance. . . access to advanced telecommunications and information services" for schools, libraries, and health care providers.[12] Consistent with this mandate, the Commission found that eligibility for universal service support should not be limited to telecommunications carriers. Indeed, in many circumstances, the most efficient provider of access to advanced services may not be a telecommunications carrier. Cable operators, on-line service providers, and other entities that are not common carriers may be able to offer access with greater bandwidth capacity at a lower cost than access offered by telecommunications providers. The Commission properly found that non-telecommunications carriers are eligible for funding under subsection 254(h)(2)(A), ensuring that any entity can compete to provide access to schools and libraries regardless of whether it is a telecommunications carrier. The Commission's conclusion in this regard furthers the goal of ensuring that universal service is delivered in the most cost-effective manner.[13]

Petitioners argue that the limitation in section 254(e), which provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support,"[14] prevents non-carriers from receiving support for

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12 47 U.S.C. § 254(h)(2)(A) (emphasis added).

13 See 47 U.S.C. § 254(b)(1).

14 47 U.S.C. § 254(e).

providing schools and libraries with access to advanced telecommunications and information services mandated by subsection 254(h)(2)(A). The statutory language, however, demonstrates that section 254(e) is not applicable to subsection 254(h)(2)(A). Section 254(e) is part of a carefully-structured scheme intended to limit eligibility for the universal service support provided in connection with basic telecommunications services. Congress sought to ensure that only carriers willing to provide basic services throughout a given area would qualify for basic service support. This limitation, however, applies solely with respect to support for these basic services. Indeed, it is the offering of "services that are supported by Federal universal service support mechanisms under section 254(c)"[15] that defines an eligible carrier.[16] The limited carrier-only eligibility under sections 214(e) and 254(e) is simply not relevant to establishing eligibility for support under subsection 254(h)(2)(A) because that section does not deal with basic telecommunications services.

B. Subsections 254(c)(3) and 254(h)(1)(B) Authorize Universal Service Support for Internet Access and Internal Connections

Contrary to Petitioners' arguments, subsections 254(c)(3) and 254(h)(1)(B) do not limit universal service support to the telecommunications services offered by telecommunications carriers. Under subsection 254(h)(1)(B), telecommunications carriers must provide a discount to schools and libraries for "any of its services that are within the definition of universal under

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[15] Section 254(c) establishes the principles for designating which telecommunications services will be defined as universal services. See 47 U.S.C. § 254(c)(1) ("Universal service is an evolving level of telecommunications services") (emphasis added).

[16] 47 U.S.C. § 214(e)(1)(A).

[section 254](c)(3)."[17] Section 254(c)(3) authorizes the Commission to designate services for schools and libraries "in addition to the services included in the definition of universal service under [subsection (c)](1)" as eligible for universal service.[18] Nothing in subsection (c)(3) explicitly limits these "additional" services to telecommunications services. The Commission was within its authority under subsection 254(c)(3) to designate Internet access and internal connections as "additional services for support" and was within its authority under subsection 254(h)(1)(B) to fund these section 254(c)(3) services.[19]

While it may be plausible to read subsection 254(h)(1) to provide support for telecommunications services and subsection 254(h)(2) to provide support for access to advanced services, the Commission's reasonable interpretation of this language is consistent with Congressional intent and therefore entitled to substantial deference.[20] Petitioners' interpretation, which would eliminate support for all but telecommunications services, carries no weight because it is directly at variance with Congress's desire to provide broad universal service support to schools, libraries and rural health care providers.[21]

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17 47 U.S.C. § 254(h)(1)(B) (emphasis added).

18 47 U.S.C. § 254(c)(3).

19 Universal Service Order at ¶ 437.

20 Courts must grant deference to an agency's reasonable interpretation of an unclear statute. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984).

21 141 Cong. Rec. S7980 (daily ed. June 8, 1995) (statement of Sen. Rockefeller) ("We intend to open the new worlds of knowledge and learning and education to all Americans, rich and poor, rural and urban. Browsing a Presidential library, reviewing the collections of the Smithsonian, studying science or finding new information on the treatment of an illness are

(continued on next page)

C. The Commission's Order Does Not Impose an Unconstitutional Tax

Petitioners claim that the Commission's implementation of section 254 has resulted in the imposition of an unconstitutional tax on telecommunications carriers. Their argument ignores the fact that, while Congress required universal service subsidies to be explicit, the redistributive nature of the new universal service mechanism is grounded in mechanisms that predated enactment of section 254. The pre-enactment system of implicit and explicit subsidies was designed to shift costs "from rural to urban areas, from residential to business customers, and from local to long distance services."[22] While this reallocation of costs resulted in transfer payments between regions and classes of customers, the prior system was not, and has never been considered to be, a "tax" on telecommunications services or carriers.[23]

This analysis is reflected in the legislative history of section 254. While the Congressional Budget Office's analysis of the universal service provisions in the House bill concluded that "cash flows from external subsidies should appear on budget as governmental receipts and direct spending," CBO did not find that this system of subsidies was a "tax" on the

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becoming available to all Americans through new technologies in their homes or at their schools, libraries and rural hospitals. And our provision . . . is designed to make sure that these links do get made to our children and citizens.").

[22] See Universal Service Order at ¶ 10.

[23] See A.L.C. Communications Corp. v. F.C.C., 1991 WL 17222, at *3 (D.C. Cir. 1991) (unpublished decision) (finding that universal service fund assessments are not a tax, but merely transfers from IXCs to high-cost LECs and low-income telephone subscribers); Rural Telephone Coalition v. F.C.C., 838 F.2d 1307, 1314 (D.C. Cir. 1988) (finding that allocation of 25 percent of "non-traffic sensitive" local telephone exchange costs to interstate jurisdiction so they could be recovered from IXCs was not tax because primary purpose was not to raise revenue).

provision of telecommunication services.[24] Senator Stevens, a primary architect of the universal service mechanisms in the 1996 Act, made clear that the universal service subsidies required by section 254 do not constitute a tax:

> There is no way that this can be determined to be a tax. It is continuing the process that the industry itself started in the interstate rate pool. The interstate rate pool . . . has never been included in the budget process. . . . The courts have held that the current universal service system is not a tax. I do not view this as a tax. I view it as one of the requirements to enter the system in a competitive spirit.[25]

Extending universal service support to schools and libraries, and more specifically, including funding for non-telecommunications carriers and support for internal connections[26] and non-telecommunications services, did not transform these previously valid transfer payments into taxes. Rather, the funding mechanism envisioned by Congress and implemented by the Commission merely extends the pre-existing support mechanism to these new beneficiaries.[27]

Petitioners also argue that the Commission's interpretation of subsections 254(c)(3), (h)(1)(B), and (h)(2)(A) effectively place no limitation on the scope and amount of funding for universal service that the Commission can require, rendering section 254 overly broad, vague,

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[24] H.R. Rep. No. 104-204, at 69 (1995); see also 141 Cong. Rec. S7959 (daily ed. June 8, 1995) (statement of Sen. Stevens) ("CBO itself did not say it was a tax but said it had to be taken into account in the budget process").

[25] 141 Cong. Rec. S7958-S7959 (daily ed. June 8, 1995) (statement of Sen. Stevens).

[26] Funding for internal connections is inherent in the Congressional directive to establish rules to "enhance . . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms." 47 U.S.C. § 254(h)(2)(A) (emphasis added).

[27] See 141 Cong. Rec. S8371 (daily ed. June 14, 1995) (statement of Sen. Stevens) ("There is no intention here to make this bill a revenue-raising measure, and it is not one. It merely intends to modify the existing universal service concept in telecommunications.").

and therefore unconstitutional. Petitioners' new-found concern with the size of the universal service fund is unavailing.[28] As the Commission found, section 254's directive to the Commission to create a "specific, predictable, and sufficient universal service support mechanism" mandates a limitation on the amount of funds available to schools and libraries.[29]

D. Section 254 Permits the Commission to Provide Federal Universal Service Support to Fund Intrastate Discounts and to Condition that Funding on State Compliance With Federal Objectives

Petitioners object to the Commission's decision to exercise its authority to provide federal universal service support to fund intrastate discounts, conditioning receipt of this federal funding on states establishing intrastate discounts that are at least equal to the interstate discounts set by the Commission.[30] The Commission's action is well within its authority. As the Commission recognized, while subsection 254(h)(1)(B) permits the states to determine the level of discount available to eligible schools and libraries with respect to intrastate services, nothing in the Act prohibits the Commission "from offering to fund intrastate discounts or conditioning

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[28] The incumbent telephone companies argued previously in this proceeding that the universal service system should cover embedded costs and construction costs, requiring a total universal service fund in excess of $20 billion. See Universal Service Order at J-56 (summarizing comments of Southwestern Bell, Ameritech, BellSouth suggesting that universal service support be based on embedded costs), J-61, 62 (summarizing comments of U S WEST suggesting that carriers be assured full recovery of construction costs); Universal Phone Service: Hearing before the Senate Commerce, Science and Transportation Committee, March 12, 1997 (statement of Roy Neel, President, United States Telephone Association) ("It is a $23 billion problem a year."). The telephone companies' proposal was criticized by other parties as excessive and overly burdensome for new entrants. See Universal Service Order at J-57 (summarizing comments of AT&T, PCIA, and CPI opposing use of embedded costs).

[29] Universal Service Order at ¶ 530.

[30] Id. at ¶ 550.

that funding on action the Commission finds to be necessary to achieve the goal that the Snowe-Rockefeller-Exon-Kerrey amendment sought to accomplish under this subsection."[31]

The Supreme Court has recognized that Congress may place conditions on the receipt of federal funds under the Spending Clause of the Constitution in order to "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[32] This is precisely what the Commission has done here. Nothing in the Commission's Order deprives the States of their authority under section 254(f).

II. PETITIONERS HAVE NOT SATISFIED THE OTHER REQUIREMENTS FOR GRANT OF A STAY

In addition to failing to show that they are likely to prevail on the merits of their arguments, Petitioners have also failed to satisfy the other three requirements for grant of a stay. The injuries Petitioners claim they will suffer if the stay is not granted are speculative at best.[33] In contrast, the issuance of a stay will substantially harm other parties interested in this proceeding by impeding the ability of carriers and non-carriers alike to compete to provide advanced services to schools and libraries.

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[31] Id.

[32] South Dakota v. Dole, 483 U.S. 203, 206 (1987) (citing Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

[33] See Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C. Cir. 1984) (holding that to warrant grant of a stay, the asserted injury must be both "certain and great" and "must be actual and not theoretical.")

The public interest is clearly favored by the denial of Petitioners' request for a stay. Petitioners' request is a self-serving effort to undermine the meaningful support granted to schools, libraries, and rural health care providers by limiting that support to telecommunications services. Staying the implementation of the education, library, and rural health care support mechanism under Section 254 would deny these institutions the benefits of universal service that Congress intended. As Congress itself realized, any delay in implementing universal service requirements will harm the public interest as "what we deprive people of now will hurt much more in the future than we can possibly imagine."[34]

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[34] 141 Cong. Rec. S7980 (daily ed. June 8, 1995) (statement of Sen. Rockefeller).

CONCLUSION

For the reasons set forth above, the Commission should deny Petitioners' request for a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 18th day of July, 1997, I caused a copy of the foregoing "NCTA Opposition to Joint Petition for Stay" to be sent by messenger (*) or by first class mail, postage prepaid to the following:

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